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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

IMPLEMENTATION OF SECTION 309(j) OF
THE COMMUNICATIONS ACT --
COMPETITIVE BIDDING

PP Docket No. 93-253

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To: The Commission

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SUPPLEMENT TO COMMENTS OF GATEWAY PCS, INC.,
NEW WAVE PCS COMMUNICATIONS, INC. AND
PERSONAL TECHNOLOGY SERVICES, INC.

GATEWAY PCS, INC., NEW WAVE PCS COMMUNICATIONS, INC. AND
PERSONAL TECHNOLOGY SERVICES, INC. ("Joint Intervenors"), through counsel,
hereby supplement their Comments filed April 3, 1995.

1. Joint Intervenors^{1/} had filed their Comments pursuant to the directive of the Commission in its *Public Notice*, DA 95-651, released March 29, 1995, in which the Commission invited public response by April 3, 1995 to the "Emergency Petition for Waiver," filed March 28, 1995 by Telephone Electronics Corporation ("TEC"), for waiver of Section 24.709(a)(1) of the Rules. The Commission requested that any reply comments be filed by no later than today, April 5, 1995.

2. One would naturally presuppose that when the Commission issued the *Public Notice*, it had not yet decided on the merits of the Emergency Petition. However, it would appear that in fact, the Commission has already decided the matter.

^{1/} Each of the Joint Intervenors is a company formed in reliance upon the rules issued by the Commission for its so-called "entrepreneur block" of frequencies in the Personal Communications Service ("PCS"). See, Fifth Report and Order on the Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (PP Docket No. 93-253), 9 FCC Rcd 5532 (1994), *as modified*, Fifth Memorandum Opinion And Order on the Implementation of Section 309(j) of the Communications Act, 10 FCC Rcd 403 (1994). The Joint Intervenors have been granted intervenor party status by the U.S. Court of Appeals for the D.C. Circuit in the appeal of the Fifth Memorandum Opinion and Order taken by TEC. See, *Order*, filed March 15, 1995, in Telephone Electronics Corporation v. F.C.C., Case No. 95-1015.

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3. National Public Radio aired a report during the April 5, 1995 edition of its *Morning Edition* program regarding the challenge made by TEC to the constitutionality of the bidding preferences. NPR Reporter Nina Teicholz attributed to unnamed "FCC officials" a decision that a "waiver is justified ... because the telephone company services rural areas and therefore helps provide universal service." In response to a comment by an opponent of the bidding preferences arguing against an exception for TEC, Deputy General Counsel Christopher Wright was quoted as saying "I really don't think it's a dangerous precedent." However, Mr. Wright was also cited as having conceded that the "TEC case will likely trigger more lawsuits over the Commission's racial and gender preferences ..."

4. In sum, it is evident that the Commission has already decided to grant the waiver to TEC. In doing so, it has deprived Joint Intervenors and other interested parties of a meaningful opportunity to participate in the proceedings involving the waiver request. This is already a "done deal."

5. Certainly TEC has been candid about its "consideration" in the deal. TEC as stated that it would dismiss its appeal in the D.C. Circuit if the requested waiver were granted. (Emergency Petition, p. 7). However, TEC's candor also demonstrates that it really has not been injured by the bidding preferences that it claimed were unconstitutional and that TEC's claims of such injury were merely bargaining chips to get the Commission to grant TEC eligibility for the entrepreneur block PCS auctions.

6. Joint Intervenors support the bidding preferences for qualified female and minority controlled small business applicants. Joint Intervenors are interested in seeing the stay lifted and entrepreneur auctions proceed as soon as possible. Further delay only aids (1) the existing cellular carriers and (2) eventually the MTA auction winners proceed to build on their respective head starts over the entrepreneur block licensees. However, Joint Intervenors do not support a special deal and exception for TEC that will only invite further challenges and delays to the PCS entrepreneur auctions by parties seeking waivers and special treatment under threat of a constitutional challenge. Indeed, the Commission's Deputy General Counsel has conceded that

this will occur. However much the Commission now rationalizes what it previously found unacceptable in the Fifth Memorandum Opinion and Order, *supra*, so as to allow TEC to participate in the auctions, the Commission's grant of such a waiver will only succeed in opening the door to further challenges, which, in turn, will delay PCS service in the entrepreneur block.

WHEREFORE, in light of the foregoing as well as the matters contained in their Comments, Joint Intervenors respectfully request that the Commission deny TEC's "Emergency Petition for Waiver."

Respectfully submitted,

**GATEWAY PCS, INC.
NEW WAVE PCS COMMUNICATIONS, INC.
PERSONAL TECHNOLOGY SERVICES, INC.**

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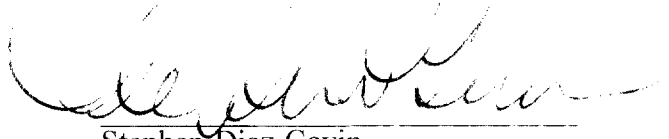
Dated: April 5, 1995
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CERTIFICATE OF SERVICE

I, Stephen Diaz Gavin, a partner in the Law Firm of Besozzi, Gavin & Craven, do hereby certify that I have caused to be served by hand delivery, this 5th day of April, 1995 a copy of the foregoing **"SUPPLEMENT TO COMMENTS OF GATEWAY PCS, INC., NEW WAVE PCS COMMUNICATIONS, INC. AND PERSONAL TECHNOLOGY SERVICES, INC.** to the following:

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